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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

QUINTERO ANTHONY SILVA,

Defendant and Appellant.

C086658

(Super. Ct. No. 17CF02656)

Defendant Quintero Anthony Silva pleaded no contest to one count of assault with a firearm and admitted a firearm use allegation. The trial court denied probation and sentenced defendant to the maximum term permitted by the plea agreement, 14 years. On appeal, defendant contends the court abused its discretion in denying his request for probation and sentencing him to the maximum term. We find no abuse of discretion and affirm the judgment.

I. BACKGROUND

Following a verbal altercation with the victim in a parking lot, defendant retrieved something from the trunk of his car, drove across the street and waited for the victim to leave a liquor store, followed the victim's car in his own car, pulled up next to him, and fired about four shots at the victim. The victim never showed a weapon. After defendant drove away, the victim followed him. Defendant then tried to persuade a passenger in his car to also fire the gun at the victim's car. The victim pulled up behind defendant, and defendant applied his brakes, which caused the victim's car to crash into his car and then spin out. Defendant then fled.

Defendant was charged with shooting at an occupied motor vehicle in violation of Penal Code section 246.¹ It was further alleged that defendant had personally used and discharged a firearm in the commission of the offense within the meaning of section 12022.53, subdivisions (b) and (c). Defendant subsequently pleaded no contest to an amended count of assault with a firearm in violation of section 245, subdivision (a)(2), and admitted an amended firearm use allegation under section 12022.5, subdivision (a). In exchange, the section 246 charge and firearm allegation attached to that charge were dismissed, and the maximum sentence defendant could receive was 14 years in state prison.

Prior to sentencing, the probation department issued its recommendation that probation be denied and that the maximum term was warranted based on the seriousness of the offense. Defendant argued that, despite his ineligibility for probation under section 1203, subdivision (e)(2), absent unusual circumstances, his case was "unusual" within the meaning of California Rules of Court, rule 4.413(c) because he was young and had no prior criminal history, was under the influence of drugs and alcohol when he committed

¹ Undesignated statutory references are to the Penal Code.

the offense, admitted his guilt early on, and was remorseful.² After reviewing the “unusual case” criteria and considering defendant’s argument, the trial court found that defendant’s case did not meet “any of the criteria.” Further, the court reasoned that “even if the defendant were not statutorily ineligible for probation, probation would be denied” based on the nature and seriousness of the offense as well as “the manner in which the crime was carried out,” which demonstrated planning.

The trial court sentenced defendant to an aggregate term of 14 years in state prison, as follows: the upper term of four years in state prison on the assault with a firearm conviction and a consecutive upper term of 10 years for the firearm use enhancement. In choosing the upper terms, the court noted that the crime disclosed a “high degree of callousness,” the manner of the crime indicated planning, and defendant engaged in conduct that indicates a serious danger to society. In mitigation, the court noted that defendant had an insignificant criminal record and expressed remorse but concluded that on the balance, the aggravating factors outweighed the mitigating factors.

II. DISCUSSION

A. Denial of Probation

Defendant contends the trial court abused its discretion in denying his request for probation. He recognizes that he was ineligible for probation unless the court found unusual circumstances but argues such circumstances are present here. We disagree.

“Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to . . . [a]ny person who used, or attempted to use, a deadly weapon upon a human being in connection with the perpetration of the crime of which he or she has been convicted.” (§ 1203, subd. (e)(2).) Rule 4.413(c) sets forth the factors which may indicate an “unusual case” in which probation may be granted. One such factor is where there is a circumstance, not

² Undesignated rule references are to the California Rules of Court.

amounting to a defense, that reduces the defendant's culpability, including: (1) there was a great provocation, coercion, or duress *and* the defendant has no record of committing crimes of violence; (2) the crime was committed because of a reduced mental condition not amounting to a defense; or (3) the defendant is youthful or aged and has no significant record of prior criminal offenses. (Rule 4.413(c)(2).) These factors are indicators the trial court *may* use to find the case unusual, but it is not required to do so. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178 (*Stuart*).) If the court determines presumptive ineligibility is overcome, that is not the end of the inquiry; the court must still decide whether to grant probation based on the criteria in rule 4.414. (*Stuart, supra*, at p. 178.)

The defendant bears a heavy burden when attempting to show an abuse of discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) "In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances." (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 825 (*Du*).)

Here, defendant contends that he fell within at least one of the factors overcoming presumptive ineligibility due to his youth and insignificant prior record, and the court thus abused its discretion in concluding that his case did not meet any of the criteria. Even if the trial court erred in concluding that defendant's case did not fall within *any* of the "unusual case" factors, the court was not required to find presumptive ineligibility overcome based on any one factor. (See *Stuart, supra*, 156 Cal.App.4th at p. 178 [The trial court may but is not required to find the case is unusual just because circumstances listed in the rule have been established].)

Further, defendant was not prejudiced because the court expressly stated it would deny probation even if defendant was eligible: "[E]ven if the defendant were not

statutorily ineligible for probation, probation would be denied for the following reasons:

[¶] Due to the nature, the seriousness and the circumstances of this case. Additionally, the manner in which the crime was carried out demonstrated planning on the defendant's part." Defendant asserts that the court's finding that there was planning is not supported by the record. We disagree. The stipulated factual basis for the plea, the probation report, reveals that after the verbal altercation in the parking lot, defendant retrieved something from his trunk, drove across the street and waited for the victim to come out of the liquor store, then followed him. This was evidence of planning, and the court was well within its discretion to deny probation based on the seriousness and manner of the offense, even if defendant was not presumptively ineligible for probation. (See rule 4.414(a)(1).) Accordingly, defendant has failed to show the trial court's decision was arbitrary, capricious, or exceeded the bounds of reason under the circumstances of this case. (See *Du, supra*, 5 Cal.App.4th at p. 825.)

B. Sentence Imposed

Defendant contends the trial court abused its discretion by imposing the upper term. Specifically, he argues that the court improperly relied on aggravating factors that were legally inapplicable and failed to consider a mitigating factor. We disagree.

A trial court's sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A trial court's choice to select an upper term is permissible if it finds even one aggravating factor. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729 (*Osband*).) "Aggravating circumstances include those listed in the sentencing rules, as well as any facts 'statutorily declared to be circumstances in aggravation' [citation] and any other facts that are 'reasonably related to the decision being made.' [Citation.]" (*People v. Black* (2007) 41 Cal.4th 799, 817.)

Here, the court imposed the upper term because it found the circumstances in aggravation outweighed those in mitigation. In support of its decision, the court noted defendant's crime involved the threat of bodily harm disclosing a high degree of

callousness, the manner of the crime indicated planning, and that he engaged in conduct that indicates a serious danger to society. Defendant contends that because the threat of bodily harm is an element of the underlying offense of assault with a firearm and the firearm use enhancement, it is not a proper aggravating factor. He is correct on this point. “A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term.” (Rule 4.420(d).) However, the court properly cited two other aggravating factors, planning and conduct that indicates a serious danger to society. Defendant contends there was no evidence of planning. For the reasons we have discussed *ante*, he is incorrect. Defendant does not challenge the court’s finding that he engaged in conduct that indicates a serious danger to society. The court’s imposition of the upper term was permissible based on these two aggravating factors. (See *Osband*, *supra*, 13 Cal.4th at pp. 728-729.)

In mitigation, the court found defendant had no significant prior criminal history and had expressed remorse. Defendant contends that the court should have considered an additional mitigating factor, defendant’s voluntary acknowledgement of wrongdoing at an early stage in the proceeding based on his no contest plea. (See rule 4.423(b)(3).) We disagree. “The Judicial Council did not have a plea bargain in mind when it proposed as a circumstance in mitigation a defendant’s early admission of guilt.” (*People v. Burg* (1981) 120 Cal.App.3d 304, 306.) Here, defendant pleaded no contest on the condition that the People dismiss the section 246 charge and firearm allegations attached to that charge. Defendant thus received the benefit of his admission, and this was not a proper mitigating factor. (See *Burg*, *supra*, at pp. 306-307.)

In sum, defendant has failed to show the trial court’s sentencing decision was so irrational or arbitrary that no reasonable person could agree with it. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) The court did not abuse its discretion.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

MURRAY, J.